

DEC 21 2009

"OPEN INTERNET" PROPOSALS AND INTERNET ACTIVITIES BY ORDINARY AMERICANS

**Prepared Statement of Prof. Glenn Harlan Reynolds, Beauchamp Brogan Distinguished Professor of Law, University of Tennessee and blogger at Instapundit.com.
Federal Communications Commission, December 15, 2009**

Thank you for inviting me to participate in this discussion, and thank you for permitting me to do so via Internet video, thus demonstrating in a tangible way one of the values of the technology we are discussing. I will first answer the specific questions that were asked, then discuss some aspects of the "open Internet" definition that the Commission is currently using, and conclude with some cautionary observations in my capacity as a veteran of communications-law practice in the 1980s, when some similar issues were being discussed.

Question one: As a prominent blogger and law professor, what are your thoughts on how the open Internet affected the opportunity for individuals to engage in journalism as an activity, not just a profession?

Journalism is indeed an activity, not a profession, and though we often refer to institutionalized media as "the press," we should remember that James Madison talked about freedom of the press as "*freedom in the use of the press*"¹ -- that is, the freedom to publish, not simply freedom for media organizations. In Madison's day, of course, printing was so simple and inexpensive that the distinction wasn't as significant as it became later, when newspaper publishing became an industrial activity. It was easy to be a pamphleteer in Madison's time, and there was real influence in being such. With the increase in efficiencies of scale that accompanied the industrial revolution, that changed, and "the press" in common parlance became not a tool of publication, but a shorthand for those organizations large and wealthy enough to possess those tools, much as the motion picture industry has come to be referred to as "the studios."

Now, however, technology has changed things up again, and the tools of Internet publication are available to anyone, however modest his or her means. (There are even homeless bloggers; I've met one of them myself). The ability to publish inexpensively, and to reach potentially millions of people in seconds, has made it possible for people who would never be able to -- or even want to -- be hired by the institutional press to nonetheless publish and influence the world, much like eighteenth century pamphleteers.

I am one of those people. When I started my blog, InstaPundit, in August of 2001 I mostly hoped to get some hands-on experience that would inform my teaching of Internet Law, and

¹ See *New York Times v. Sullivan*, 376 U.S. 254, 275 (1964) (quoting Madison).

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secondarily I hoped to reach an audience of (at most) a few hundred academics and journalists with whom I was personally acquainted. Within a few weeks I was receiving thousands of pageviews per day, and InstaPundit now receives somewhere between four and five hundred thousand pageviews on a typical day.

The Internet has also made all sorts of new journalistic models available. Independent journalists like Michael Yon (michaelyon-online.com) and Michael Totten (michaeltotten.com) have provided compelling firsthand reporting from places like Iraq, Lebanon, and Afghanistan, supported entirely by reader donations. At a time when “mainstream” publications are closing foreign bureaus and slashing reporting budgets, this is a new model for reporting that rewards painstaking reporting and excellent writing, producing results that are, in these two cases, comparable to the very highest level work from traditional professionals. Nor are they the only ones, as we’ve seen similar work from Bill Roggio, J.D. Johannes, and others.

In addition, the Internet has allowed citizen reporting by those who happen to be present when news happens. With the ubiquity of cellphones, digital cameras, and portable video cameras (often within the same device), the odds are now high that when something interesting happens, there will be someone there equipped and inclined to record and report it. This has raised some troubling issues -- particularly an increase in (generally illegal) harassment of photographers by police who view taking photos and video as inherently suspicious -- but it has also ensured that many events that would have gone unnoted before are now widely observed.

And of course, the Internet provides an audience for political comedy and parody, important forms of political speech that often have as much impact as actual news reportage. With inexpensive software tools like Photoshop, iMovie, Windows Movie Maker, and the like, anyone with an idea can produce something interesting in a matter of hours -- and if it’s interesting enough, see it reach an audience of millions.

But all of this is just the beginning: Though we’ve seen dramatic accomplishments by citizen journalists already, I think that we are still in the very early days of a true revolution. Unless I miss my guess, the next decade will see citizen involvement in the production of news and entertainment reach levels that vastly exceed anything seen in the past decade.

Question Two: Why are low barriers to entry important for promoting diverse speech on the open Internet? How would citizen journalists be affected if they had to pay tolls, or worry about controversial speech being blocked? What concerns would you have if the Internet did not abide by openness norms, and how would it affect your blogging? You write about controversial topics; any concerns about censorship by gatekeepers?

Low barriers to entry are important because ordinary people lack the resources of time, money, and expertise needed to overcome higher barriers. When only one or two people are putting in the hours, even a small person-hour threshold can seem quite high. Likewise, when an activity is

done as a not-for-profit hobby, expenses in terms of fees (or regulatory compliance) that would seem very modest in the context of a business are likely to prove quite daunting. The secret to the Internet's success so far has been the near-total absence of barriers to entry, which has allowed creativity to flourish, and communication to spread widely.

"Tolls" -- whether in the form of commercial fees or regulatory barriers -- would undoubtedly tend to deter citizen journalists. The blocking of "controversial" speech might do the same, or might not. To date, efforts to use bogus DMCA takedown notices, or libel threats, to shut down controversial speech have generally backfired. On the other hand, if such blocking became commonplace, it would undoubtedly demoralize many, since citizen journalists usually lack the resources to mount legal challenges to such actions.

It's hard for me to know how a departure from "openness" norms would affect my blogging. I'm inclined to think that I would keep on, regardless, but even if I did so, such barriers would undoubtedly discourage new entrants, depriving the alternative media of the steady input of fresh creativity that is their greatest strength.

As for concerns regarding censorship by gatekeepers, yes, I'm concerned to a degree. On the private level, we already see this. Workplace concerns about "sexual harassment" lead to a degree of prudery that seems almost Talibanesque at times. A few years back my site had an ad from a high-end art gallery featuring a nude bronze statue. It was very clear from the picture in the ad that it was an art statue, but numerous readers complained that they risked trouble with their human-relations offices if something like that were seen on their computers. The obviously sincere worry in those emails made me feel that I was living in some sort of dystopian novel.

But censorship for political reasons is obviously worse and, given the impulse of partisans to silence the opposition, not at all unthinkable; we've already seen ongoing efforts by some groups to "flag" content they dislike at YouTube and Blogspot. To the extent that the FCC wants to promote free and open Internet speech, it obviously should work to minimize opportunities for such blockage, and to encourage the existence of numerous alternatives in robust competition, to ensure that blockage won't matter much.

Question Three: Should the same ground rules for content distribution over the Internet apply to all comers? This is the hardest question. I'm inclined to say "yes," because the success of the Internet to date is that every location is, essentially, equal. They're all a click away, and they're all equally accessible to the average user. This has had a levelling effect that has been tremendously beneficial.

On the other hand, this question can be rephrased as something like this: **Should the federal government set ground rules for content distribution over the Internet that apply to all comers?** And that seems a good deal more likely to be a bad idea, for two reasons, with all due respect to those present: Corruption, and ignorance.

Having said that, the FCC's definition of openness does not look bad to me:

Service providers do not favor or disfavor traffic based on who sends or receives it.

Service providers do not favor or disfavor the transmission of information based on its content.

Service providers do not require content providers to pay fees to guarantee that their content will be delivered at the same or higher speed than others' content (setting aside caching and content-delivery-network services).

I am concerned, though, that the involvement of the FCC in Internet regulation will pose unfortunate temptations toward overuse, and abuse, of government power, something that we have seen in the past.²

That the power to control communication leads, more or less inevitably, to the tendency to control communication in ways that advantage one's own political faction seems to me indisputable: It is, after all, the reason for the First Amendment. One reason why content distribution over the Internet has done so well has been, to put it bluntly, that the government has had nothing to do with it. Though the formulation above sounds neutral and simple enough, a cynic might conclude -- and, in my experience, the "cynics" in such matters are almost always right -- that over time "neutrality" is likely to be redefined in ways that turn out to be something less than neutral.³

The other problem, that of ignorance, is even worse, and it is here that my own experience may be of some use. Before I entered the legal academy, I practiced law at the Washington, DC office of Dewey, Ballantine (now Dewey & LeBoeuf). Much of my work involved telecommunications, including efforts on -- does this sound familiar? -- Open Network Architecture. Those for whom the term *Computer III Inquiry* rings a bell will remember that vast amounts of energy and intellectual capital -- not to mention client billings, which in my former role was a feature, not a bug -- went into plans to open up computer networks based on a 1980s understanding of what that meant. Likewise, I remember a fat document from the National Telecommunications and Information Administration at the Department of Commerce, entitled *Telecom 2000*. Comprehensive and thoughtful, it outlined all sorts of important policy issues and suggestions for resolving them -- nearly all of which were made obsolete within just a few years by the invention of the World Wide Web. (And don't get me started on the Congressional hearings where members asked, angrily, why the United States hadn't created something like the soon-to-be-obsolete French Minitel network.) The problems that all these excellent minds were addressing -- and I'm sincere in my praise, as, after all, I was one of them -- were destined to

² See generally, L.A. Powe, Jr., *American Broadcasting and the First Amendment* (1988) (describing political uses and abuses of FCC's power to regulate broadcasters).

³ Such fears seem quite bipartisan. Compare Steve Forbes, *Net Neutrality Rules Would Dilute Concept of Ownership on Internet*, Investor's Business Daily, December 3, 2009, available online at <http://www.investors.com/NewsAndAnalysis/Article.aspx?id=514250>, with Electronic Frontier Foundation, *Is Net Neutrality A FCC Trojan Horse*, available online at <http://www.eff.org/deeplinks/2009/09/net-neutrality-fcc-perils-and-promise>.

vanish because of technology, leaving all that work as a form of stranded intellectual investment. But, of course, it would have been much worse if, somehow, the Web had been blocked because it didn't accord with those efforts.

The point is that technology moves much faster than regulators, and that the Internet's resulting near-freedom from regulation has been a good thing. It is also likely that -- if things go well -- communications technology will continue to advance faster than regulation can keep up, and that even well-meaning and constructive-sounding rules, like "equal treatment for all comers," may wind up frustrating innovation and limiting freedom over the long term.

My advice for the Commission is thus that it move slowly, and that it act as narrowly as possible to resolve only problems that have actually appeared as problems, rather than trying to prevent future problems that are as yet conjectural. The Internet has done very well as a largely unregulated space, and in light of that success, those advocating a shift to regulation should have a heavy burden of proof.